

Criminal Procedure Monograph 8: Felony Sentencing

May-August 2009 Updates

Updates have been issued for Criminal Procedure Monograph 8. A summary of each update appears below. The updates have been integrated into the website version of the monograph; consequently, some of the page numbers may have changed. Clicking on the links below will take you to the page(s) in the monograph where the updates appear. The text added or changed in each update is underlined.

8.6(H) OV 7—Aggravated Physical Abuse

“‘[S]adism’ denotes conduct that exceeds that which is inherent in the commission of the offense.” *People v McReynolds*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2009 (Docket No. 282582).

8.6(J) OV 9—Number of Victims

“[A] defendant’s conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise” (the defendant’s flight from the police after breaking and entering an unoccupied building was an impermissible basis for scoring the number of victims under OV 9, because OV 9 does not expressly authorize the consideration of conduct that occurs after the sentencing offense is completed). *People v McGraw*, 484 Mich 120, 122, 133-135 (2009).

OV 9 was improperly scored at 25 points for the crime of using a computer to produce child sexually abusive material, when the circuit court counted as victims the children depicted in thousands of pornographic images that the defendant downloaded from the Internet and copied onto discs. *People v Houck*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2009 (Docket No. 285203). Because the defendant did not have any contact with the children, he did not place them “in danger of physical injury or loss of life” (MCL 777.39(2)(a)); therefore, the correct score for OV 9 was zero points. *Id.*

8.6(K) OV 10—Exploitation of a Vulnerable Victim

The trial court improperly assessed 15 points for OV 10 where the girls at whom the defendant’s grooming was directed were not victims of the criminal activity for which the defendant was ultimately convicted. *People v Houck*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2009 (Docket No. 285203).

8.9(B) Felony Offenses enumerated in MCL 777.18 (Offenses Predicated on an Underlying Felony)

“MCL 333.7413(2), by authorizing a trial court to enhance the sentence of a defendant who is a repeat drug offender to a ‘term not more than twice the term otherwise authorized,’ allows the trial court to double *both* the defendant’s minimum and maximum sentences.” *People v Lowe*, 484 Mich 718, 719-720 (2009).

8.16(C) Sentencing an Offender for a Subsequent “Major Controlled Substance Offense”

“[MCL 333.]7413(2)’s authorization for a trial court to imprison a defendant for a ‘term not more than twice the term otherwise authorized’ signifies that both the minimum and maximum sentences must be doubled to fashion an enhanced sentence that is twice the ‘term otherwise authorized.’” *People v Lowe*, 484 Mich 718, 724 (2009).

8.30 Additional Information to Consider Before Imposing Sentence

“[G]enerally, a court may neither solicit nor consider polygraph-examination results for sentencing, *People v Towns*, 69 Mich App 475, 478 (1976), and the consideration of polygraph-examination results is generally considered error that requires resentencing, *People v Allen*, 49 Mich App 148, 151-152 (1973).” (Parallel citations omitted.) *People v Anderson*, 284 Mich App 11, 16 (2009).

8.31 Sentence Credit

“A defendant is entitled to credit for time served prior to sentencing [under MCL 769.11b] even if he [or she] is sentenced to serve a mandatory term of life imprisonment without parole.” *People v Seals*, Mich App , (2009).

“When a defendant is incarcerated in another jurisdiction, ‘whether a hold has, or could have, entered against the defendant is irrelevant for purposes of determining how much time the defendant has served “for the offense of which he [or she] is convicted.”’” *People v Patton*, Mich App , (2009), quoting *People v Adkins*, 433 Mich 732, 748 (1989), quoting MCL 769.11b.

People v Idziak, 484 Mich 549, 562 (2009), “reaches essentially the same conclusion as the Court of Appeals did in [*People v*] *Seiders*[, 262 Mich App 702 (2004),] and [*People v*] *Filip*[, 278 Mich App 635 (2008)]—that the jail credit statute does not generally apply to parolees who commit new felonies while on parole—[but] on the basis of a somewhat different analysis.” The *Idziak* Court held that “the jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his [or her] earlier sentence unless and until discharged by the Parole Board. For that reason, he [or she] remains incarcerated regardless of whether he [or she] would otherwise be eligible for bond

before conviction on the new offense.” *Idziak, supra* at 562. Because the parolee is not being incarcerated due to being denied or unable to furnish bond for the new offense, the jail credit statute, MCL 769.11b, does not apply. *Idziak, supra* at 562-563.

8.34 Costs

“The plain language of MCL 769.1k does not require the trial court to consider a defendant’s ability to pay before imposing discretionary costs and fees” [*People v Wallace*, 284 Mich App 467, 470 \(2009\)](#).

MCL 769.34(6) addresses the sentencing guidelines and the duties of the court when sentencing, and it authorizes the court to order court costs (“[a]s part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments”). [*People v Lloyd*, Mich App, \(2009\)](#). Accordingly, the plain language of MCL 769.1k and MCL 769.34(6) “expressly grant[] the trial court authority, when sentencing, to order a defendant to pay court costs.” *Lloyd, supra* at ____.

lying unconscious on the ground. Additionally, the victim was deprived of oxygen for a period of four to six minutes . . . and currently remains comatose with little or no chance of ever regaining consciousness.” *People v James*, 267 Mich App 675, 680 (2005).

“[S]adism’ denotes conduct that exceeds that which is inherent in the commission of the offense.” *People v McReynolds*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2009 (Docket No. 282582).

Fifty points should be scored for “sadism” when a defendant’s conduct subjects the victim to extreme or prolonged pain or humiliation and the *conduct* is inflicted for the defendant’s gratification. *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, decided February 24, 2004 (Docket No. 240344). The statutory language does not require that the defendant be gratified by the victim’s pain or humiliation, only that the defendant’s conduct itself be intended to gratify the defendant. MCL 777.37(1)(a), (3). Because the defendant performed sexual acts for his own gratification and those acts caused the victim to experience extreme humiliation, OV 7 was properly scored at 50 points. *Taylor, supra*.

See also *People v Hawkins*, unpublished opinion per curiam of the Court of Appeals, decided March 29, 2002 (Docket No. 226718) (before “terrorism” was eliminated from OV 7’s statutory language). In *Hawkins*, the defendant committed the assault while wearing a mask and dark clothing. He covered the victim’s head and drove her to an undisclosed location where he bound her hands and covered her eyes with duct tape and sexually assaulted her. The defendant’s actions were sufficient to warrant points for engaging in conduct designed to substantially increase the fear and anxiety suffered by a victim during the offense. *Id.*

The statutory language governing OV 7 does not define “excessive brutality,” but the dictionary definition of the phrase indicates that it contemplates conduct involving an unusual or unnecessary degree of cruelty or savagery. *People v Jones*, unpublished opinion per curiam of the Court of Appeals, decided July 22, 2003 (Docket No. 238557), citing *Random House Webster’s College Dictionary* (1992). According to the *Jones* Court, OV 7 reflects a clear legislative intent to vest “the trial courts of this state with discretion to assess guidelines points for such deaths along a continuum ranging from one blow resulting in an unanticipated death to the type of savage, relentless beating the evidence in this case established.” *Id.* The Court continued:

“[W]hether the entire incident was measured in minutes or seconds, the evidence at trial, which showed that defendant pursued the victim over a distance of 300 feet, and administered ‘countless’ blows to the victim’s torso and head until the victim could not move, and ultimately bled to death from internal injuries, clearly supports the trial court’s finding of ‘excessive brutality.’” *Id.* (citations omitted).

sister, and because the defendant's sexual abuse of the sister did not arise out of the same transaction as the abuse of the victim. *Id.* at 351.

See also *People v McGraw*, 484 Mich 120, 122, 133-135 (2009), where the Supreme Court held that “a defendant’s conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise.” In *McGraw*, the defendant’s flight from the police after breaking and entering an unoccupied building was an impermissible basis for scoring the number of victims under OV 9, because OV 9 does not expressly authorize the consideration of conduct that occurs after the sentencing offense is completed.

OV 9 was properly scored at ten points (two to nine victims) where the defendant shot a bystander who attempted to aid the armed robbery victim. *People v Morson*, 471 Mich 248, 261-262 (2004).

OV 9 was correctly scored at ten points (two to nine victims) where the decedent, her fiance, and her child were with her in the car when the defendant fatally shot the decedent through the car’s windshield. *People v Kimble*, 252 Mich App 269, 274 (2002), *aff’d* on other grounds 470 Mich 305 (2004).

Ten points were appropriate under OV 9 where videotaped evidence showed a female victim and a male victim actually being harmed, or being placed in danger of injury, as a result of the defendant’s conduct. *People v Wilkens*, 267 Mich App 728, 741-742 (2005).

See also *People v Houck*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2009 (Docket No. 285203), where OV 9 was improperly scored at 25 points for the crime of using a computer to produce child sexually abusive material, when the circuit court counted as victims the children depicted in thousands of pornographic images that the defendant downloaded from the internet and copied onto discs. Because the defendant did not have any contact with the children, he did not place them “in danger of physical injury or loss of life” (MCL 777.39(2)(a)); therefore, the correct score for OV 9 was zero points. *Id.*

OV 9 was improperly scored at ten points where, even though the defendant was charged with gross indecency involving the victim and two other minors on a different occasion, the instance of CSC-1 for which the defendant was being sentenced only involved one of the girls. *People v Gullett*, 277 Mich App 214, 217-218 (2007). The *Gullett* Court applied *People v Chesebro*, 206 Mich App 468, 471 (1994),* which held that “the calculation of victims [is] limited to those victims involved in the specific transaction that gave rise to the particular conviction for which sentence is being imposed.” *Gullett, supra* at 217. According to the *Gullett* Court, where the record revealed that the defendant was convicted and sentenced on only one charge of CSC-1 involving a single victim, the sentencing court erred in assessing points for OV 9 based on the number of victims involved in a separate incident. *Id.* at 218.

*See Section 8.6(J)(3).

To determine whether 15 points may be properly assessed under OV 10, trial courts should make the following inquiries:

“(1) Did the offender engage in conduct before the commission of the offense?”

“(2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?”

“(3) Was victimization the offender’s primary purpose for engaging in the preoffense conduct?”

If a trial court can answer “yes” to all of the above questions, the offender engaged in predatory conduct under MCL 777.40, and the court may properly assess 15 points for OV 10. *Cannon, supra* at 162.

See *People v Steele*, 283 Mich App 472, 491-492 (2009), where the Court employed the three-part test for predatory conduct delineated in *People v Cannon*, 481 Mich 152, 158-159 (2008) (trial court properly assessed 15 points for OV 10 where: (1) the victims testified that numerous sexual assaults occurred for an extended period of time before commission of the sentencing offense; (2) the defendant groomed the victims, who were his young adopted grandchildren; and (3) the grooming was done for the purpose of desensitizing the victims in order to escalate his victimization of them over time).

See also *People v Houck*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2009 (Docket No. 285203) (trial court improperly assessed 15 points for OV 10 where the girls at whom the defendant’s grooming was directed were not victims of the criminal activity for which the defendant was ultimately convicted).

2. Case Law Under the Statutory Guidelines

Abuse of authority status. Where the defendant argued that OV 10 was improperly scored because no evidence was presented “to indicate any manipulation by defendant or any exploitation of his status,” ten points were correctly assessed against the 67-year-old defendant, who was in the process of adopting the 14-year-old victim at the time he sexually assaulted her. *People v Phillips*, 251 Mich App 100, 109 (2002).

Ten points are proper only where the defendant has exploited a *victim’s* vulnerability; that is, when the defendant “exploit[s] a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status.” MCL 777.40(1)(b). Ten points were not proper when the score was based on the fact that the defendant’s two children were passengers in the defendant’s car when she drove through a flashing red light and killed the driver of another vehicle. *People v Hindman*, 472 Mich 875 (2005), reversing the unpublished

Possession with intent to deliver cocaine or a narcotic drug listed in schedule 1 or 2 within 1,000 feet of school property. MCL 333.7410(3) provides the penalty for a person aged 18 years or older who violates MCL 333.7401(2)(a)(iv) (less than 50 grams) by possessing with the intent to deliver a controlled substance described in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(iv) (cocaine and related substances) on or within 1,000 feet of school property. An offender convicted of violating MCL 333.7410(3) is subject to:

- mandatory imprisonment for not less than two years* and not more than two times the maximum term of 20 years authorized under MCL 333.7401(2)(a)(iv); and
- a discretionary fine not to exceed three times the \$25,000.00 fine permitted under MCL 333.7401(2)(a)(iv).

*The trial court may depart from the mandatory minimum term for substantial and compelling reasons. MCL 333.7410(5).

Possession of GBL or other controlled substance on or within 1,000 feet of school property. MCL 333.7410(4) provides the penalty for persons aged 18 years of age or older who violate MCL 333.7401b or 333.7403(2)(a)(v), (b), (c), or (d), by possessing GBL or a controlled substance on or within 1,000 feet of school property. An offender convicted of violating MCL 333.7410(4) is subject to:

- mandatory imprisonment, or the imposition of a fine, or both, not to exceed two times the term of imprisonment or twice the amount of fine authorized by MCL 333.7401b or 333.7403(2)(a)(v), (b), (c), or (d).*

*The terms of imprisonment and the amounts of the fines vary with the controlled substance involved in each of these statutes.

B. Subsequent Controlled Substance Violations— MCL 333.7413(2) or (3)

MCL 333.7413(2) provides the penalties possible for a person convicted of a second or subsequent offense under article 7 of the Public Health Code, MCL 333.7101 to 333.7545 (controlled substances offenses). MCL 333.7413(2) applies to “general” controlled substance offenses not otherwise addressed by the specific sentencing provisions of MCL 333.7413(1) and (3). Offenders convicted under MCL 333.7413(2) may be sentenced to a term of imprisonment up to twice the term authorized by the statute governing the specific offense, or may be fined up to two times the amount permitted for a violation of the specific offense, or both. MCL 333.7413(2).

“MCL 333.7413(2), by authorizing a trial court to enhance the sentence of a defendant who is a repeat drug offender to a ‘term not more than twice the term otherwise authorized,’ allows the trial court to double both the defendant’s minimum and maximum sentences.” *People v Lowe*, 484 Mich 718, 719-720 (2009).

Mich App 416, 429-431 (2005). In *Williams, supra* at 430-431, the trial court properly concluded that MCL 333.7413(2) authorized it to double both values in the range recommended under the guidelines—in that case, from the range of 5 to 23 months “otherwise authorized” for conviction, to a range of 10 to 46 months. The Court of Appeals agreed:

“[T]he clear and unambiguous language of MCL 333.7413(2) does not differentiate or suggest a distinction, either explicitly or implicitly, between maximum and minimum sentences; therefore, the word ‘term’ can entail and contemplate both maximum and minimum sentences.” *Williams, supra* at 427.

See also *People v Lowe*, 484 Mich 718, 724 (2009) (“§ 7413(2)’s authorization for a trial court to imprison a defendant for a ‘term not more than twice the term otherwise authorized’ signifies that both the minimum and maximum sentences must be doubled to fashion an enhanced sentence that is twice the ‘term otherwise authorized’”).

MCL 333.7413(5) defines “second or subsequent offense”:

“[A]n offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under this article or under any statute of the United States or of any state relating to a narcotic drug, marihuana, depressant, stimulant, or hallucinogenic drug.”

Like the outcome of the defendant’s challenge in *Poole, supra* at 710-711, with regard to sentence enhancement under MCL 333.7413(1), an offender’s *convictions* for purposes of MCL 333.7413(2) must *follow* one another: there is no requirement in the statute regarding the temporal sequence of the *commission dates* of the offenses on which the offender’s convictions are based. *People v Roseburgh*, 215 Mich App 237, 239 (1996).

8.17 Application of the Habitual Offender Provisions to Offenses Involving Statutory Escalation Schemes

Whether the habitual offender sentencing provisions may be concurrently applied to specific subsequent felony convictions is dependent on whether the Legislature has already provided a sentencing enhancement scheme for successive felony violations. “Where the legislative scheme pertaining to the underlying offenses elevates the offense, rather than enhances the punishment, on the basis of prior convictions, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions is permitted.” *People v Fetterley*, 229 Mich App 511, 540-541 (1998). However, where the statute under which a defendant was convicted enhances the punishment based on prior convictions of that offense, use of the general habitual offender provisions is improper. See e.g., *People v Honeycutt*, 163 Mich App 757, 760-762 (1987) (because MCL 750.227b, the felony-firearm

make certain factual findings to select a specific minimum sentence from within a defined range.” *Id.* (citations omitted).

- ◆ A defendant’s last-minute plea or waiver of the right to a jury trial. *People v Earegood*, 383 Mich 82, 85 (1976).
- ◆ A defendant’s exercise of his or her constitutional right to trial by jury or a defendant’s waiver of a jury trial. *People v Godbold*, 230 Mich App 508, 517-520 (1998).
- ◆ A defendant’s polygraph results. *Adams, supra* at 687 n 6; *People v Towns*, 69 Mich App 475, 479 (1976). See also *People v Anderson*, 284 Mich App 11, 16 (2009) (“generally, a court may neither solicit nor consider polygraph-examination results for sentencing, *People v Towns*, 69 Mich App 475, 478 (1976), and the consideration of polygraph-examination results is generally considered error that requires resentencing, *People v Allen*, 49 Mich App 148, 151-152 (1973) [parallel citations omitted]”).
- ◆ A defendant’s eligibility for parole. *People v Wybrecht*, 222 Mich App 160, 173 (1997).
- ◆ The possibility that a defendant may be granted early release or community placement. *People v Miller*, 206 Mich App 638, 642 (1994); *People v McCracken*, 172 Mich App 94, 101-103 (1988).
- ◆ Local sentencing policy, to the extent that it prevents an individualized sentence tailored to the circumstances of the offense and the offender. *People v Chapa*, 407 Mich 309, 311 (1979); *People v Catanzarite*, 211 Mich App 573, 583-584 (1995).
- ◆ The length of any consecutive or concurrent sentences to which the defendant may also be subject. *People v Miles*, 454 Mich 90, 95, 101 (1997).

8.31 Sentence Credit

A defendant is entitled to credit for presentence time served on the offense for which he or she was convicted and is being sentenced *if* the presentence incarceration was due to the denial of bond or the defendant’s inability to furnish bond. MCL 769.11b; *People v Preiskorn*, 424 Mich 327, 334, 344 (1985). Credit for time served must be time a defendant spent incarcerated for the sentencing offense against which the credit is awarded; a defendant cannot receive credit for time served for an offense unrelated to the sentencing offense. *People v Heim*, 206 Mich App 439, 442 (1994).

When a defendant is entitled to credit for time served, the trial court must grant the credit at the defendant’s sentencing. MCL 769.11b, the sentencing credit statute, provides:

“Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.”

“A defendant is entitled to credit for time served prior to sentencing [under MCL 769.11b] even if he [or she] is sentenced to serve a mandatory term of life imprisonment without parole.” *People v Seals*, Mich App (2009).

Presentence incarceration must be for sentencing offense. When a defendant is serving time on a sentence and a subsequent offense is adjudicated during the incarceration, the defendant is not entitled to credit against the second offense for time served before sentencing because he or she was incarcerated and serving time on an unrelated offense. *People v Givans*, 227 Mich App 113, 125 (1997); *People v Alexander (After Remand)*, 207 Mich App 227, 229 (1994).

Similarly, a defendant is not entitled to credit for time served against a sentence that must run consecutively to a sentence the defendant was serving at the time of the subsequent offense. *People v Connor*, 209 Mich App 419, 431 (1995). Time spent incarcerated while awaiting disposition of the subsequent offense is “presentence time served that [the defendant] was already obliged to serve under a prior sentence.” *Id.*

A defendant is not entitled to credit against a sentence imposed for a crime committed while the defendant was on parole; time served in jail before being sentenced for the subsequent offense is properly credited against the unexpired portion of the sentence for the offense for which the defendant was paroled. MCL 791.238(2); *People v Stewart*, 203 Mich App 432, 433 (1994).

See also *People v Stead*, 270 Mich App 550, 551-552 (2006). A defendant who spends time in jail for an offense committed while the defendant was on parole is a parole detainee for whom bond is not considered. A parole detainee is entitled to credit against the sentence from which he or she was paroled for any time spent in jail awaiting disposition of the new offense.

Presentence incarceration must be due to denial or inability to furnish bond. A defendant is not entitled to credit for time spent in boot camp when the defendant’s participation in the program was not due to his being denied bond or being unable to furnish bond. *People v Wagner*, 193 Mich App 679, 682 (1992) (the defendant was sentenced after he failed to complete a boot camp program originally imposed in lieu of prison; he was not entitled to sentence credit for that time because it did not result from a denial or inability to post bond).

When a defendant's participation in a tether program did not result from a denial of bond or an inability to post bond, the time spent in the program does not qualify for credit under MCL 769.11b. *People v Reynolds*, 195 Mich App 182, 183 (1992).

The sentencing credit statute does not entitle a defendant to sentence credit for time spent in a drug rehabilitation program, even when participation in the program was a condition of probation, unless the defendant's placement in the program was due to his or her inability to furnish bond. *People v Whiteside*, 437 Mich 188, 196 (1991).

MCL 769.11b does not authorize credit for time served at a treatment or rehabilitation center where the trial court delayed the defendant's sentencing "to give [the defendant] the opportunity to prove to the court his eligibility for probation or other leniency compatible with his rehabilitation." *People v Scott*, 216 Mich App 196, 200 (1996).

Where a defendant's placement in a treatment or rehabilitation facility is not the equivalent of serving time "in jail" and was not occasioned by the court's denial of bond or the defendant's inability to post bond, MCL 769.11b does not apply. *Scott*, *supra* at 199.

"When a defendant is incarcerated in another jurisdiction, 'whether a hold has, or could have, entered against the defendant is irrelevant for purposes of determining how much time the defendant has served 'for the offense of which he [or she] is convicted.'" *People v Patton*, _____ Mich App _____ (2009), quoting *People v Adkins*, 433 Mich 732, 748 (1989), quoting MCL 769.11b. In *Patton*, *supra* at _____, a criminal complaint was filed, and a warrant was issued for the defendant's arrest, in October 2002. However, it was not until February 2006 that the prosecution learned that the defendant was incarcerated in a federal penitentiary and entered a detainer against him. *Id.* at _____. The defendant was not informed of the detainer until August 2006, at which time he requested a final disposition of the Michigan charge. He was transferred to Michigan in November 2006, and pleaded no contest to the Michigan charge. *Id.* at _____. The defendant argued that he was entitled to credit for time served from the date a detainer could have been entered against him in October 2002, or at the very least, from the time the detainer was actually entered in February 2006. *Id.* at _____. However, the defendant's incarceration in the federal penitentiary before November 2006 was not the result of his being denied or unable to furnish bond for the Michigan charge; therefore, he was "not entitled to sentence credit for time served from the date a detainer could have, or was, entered against him." *Id.* at _____. The defendant was entitled to sentence credit for time served from November 2006, when he was transferred to Michigan, until he was sentenced. *Id.* at _____.

A defendant is not entitled to credit for time served against his or her Michigan sentence when the defendant is held as a parole detainee from a foreign jurisdiction. *People v Seiders*, 262 Mich App 702, 705 (2004). The plain language of MCL 769.11b dictates the outcome in such cases:

“MCL 769.11b does not . . . entitle a defendant to credit for time served prior to sentencing if he is incarcerated for an offense other than that for which he is ultimately convicted, or for other, unrelated reasons. . . . [B]ond is neither set nor denied when a defendant is held in jail on a parole detainer. Apparently, the *Johnson* Court did not consider the fact that the defendant was incarcerated due to a parole detainer. Because defendant was held on a parole detainer, the question of bond is not an issue, and MCL 769.11b does not apply [internal citations omitted].” *Seiders*, *supra* at 706-707.

Seiders, *supra*, resolved the question of sentence credit against a defendant’s Michigan sentence when the defendant is sentenced for a crime committed in Michigan while he or she was on parole from a foreign jurisdiction. “Given the clear and unambiguous language of the relevant statutory provisions, the *Seiders* [] Court’s holding . . . was not unexpected or indefensible[;]” therefore, the *Seiders* rule is fully retroactive. *People v Meshell*, 265 Mich App 616, 640-641 (2005).

See also *People v Stead*, 270 Mich App 550, 551-552 (2006) (because bond is not considered for a parole detainee, time served is not creditable to current offense).

See also *People v Filip*, 278 Mich App 635, 641 (2008), where the trial court erred in granting credit against a defendant’s sentencing offense for the time the defendant served in jail on a parole detainer because a parole violator “is not serving time in jail because of an inability to pay or denial of bond on the new charge; rather, he is serving time in jail because he is being held on a parole detainer. . . . [A]ccording to *Seiders*,* the question of bond is not an issue, and MCL 769.11b does not apply.” The Court further explained:

“MCL 791.238(1) provides that a parolee remains legally in the custody of the Department of Corrections, and that ‘[p]ending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated.’ This provision unambiguously declares that parole violators cannot avoid confinement pending resolution of the violation proceedings. Such a period of incarceration thus constitutes part of the original sentence and in that sense is credited against it. Moreover, ‘denied,’ as used in MCL 769.11b, implies the exercise of discretion, not the recognition of outright ineligibility. For that reason, MCL 769.11b simply does not apply to parole detainees.” *Filip*, *supra* at 641-642.

See also *People v Idziak*, 484 Mich 549, 562 (2009), where the Supreme Court “reach[ed] essentially the same conclusion as the Court of Appeals did in [*People v*] *Seiders*[, 262 Mich App 702 (2004).] and [*People v*] *Filip*[, 278 Mich App 635 (2008)]—that the jail credit statute does not generally apply to parolees who commit new felonies while on parole—[but] on the basis of a somewhat different analysis.” The *Idziak* Court held that “the jail credit statute does not apply to a parolee who is convicted and sentenced to a new

**People v Seiders*, 262 Mich App 702 (2004).

*Sentences involving SAI units are discussed in detail in Section 8.47, below.

term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his [or her] earlier sentence unless and until discharged by the Parole Board. For that reason, he [or she] remains incarcerated regardless of whether he [or she] would otherwise be eligible for bond before conviction on the new offense.” *Idziak, supra* at 562. Because the parolee is not being incarcerated due to being denied or unable to furnish bond for the new offense, the jail credit statute, MCL 769.11b, does not apply. *Idziak, supra* at 562-563.

Refuting the popular argument of recidivist parolees that time spent awaiting sentence on a new conviction is “dead time,” the Court of Appeals explained in *People v Robert Johnson*, 283 Mich App 303, 312-313 n 4 (2009), that regardless of whether parole is revoked or not revoked, time served awaiting a subsequent conviction is credited toward the conviction for which the defendant was on parole. “If parole is revoked, the defendant is obligated to serve out the balance of the maximum sentence for the conviction that formed the basis for parole.” *Id.* at 311, citing MCL 791.238(5) and MCL 791.234. “If parole is not revoked, the defendant continues to accrue time toward his [or her] ultimate discharge for the conviction upon which he [or she] enjoys parole.” *Robert Johnson, supra* at 311, citing MCL 791.238(6). “The only time a defendant stops accruing time toward his or her ultimate discharge from the Department of Corrections is when a parolee has a warrant issued for a parole violation and the parolee remains at large.” *Robert Johnson, supra* at 311. “After a warrant is issued, ‘[t]he time from the date of the declared violation to the date of the prisoner’s availability for return to an institution shall not be counted as time served.’” *Id.*, quoting MCL 791.238(2).

Special alternative incarceration units. When a defendant is ordered to participate in a special alternative incarceration (SAI) unit* as a condition of probation, double jeopardy considerations demand that the time spent there must be credited against the sentence imposed after the defendant’s probation violation if placement in the SAI unit is the equivalent of being “in jail.” *People v Hite (After Remand)*, 200 Mich App 1, 2 (1993) (the boot camp was enclosed by an eighteen-foot high fence topped with barbed wire).

Double jeopardy considerations when presentence time served is the equivalent of being “in jail.” Whether credit for time served as a condition of probation is required by double jeopardy considerations depends on the meaning of the phrase “in jail” for purposes of both the sentencing credit statute (MCL 769.11b) and the probation revocation statute (MCL 771.4). *Whiteside, supra* at 201. According to the *Whiteside* Court, typical rehabilitation programs are not jails as the term is commonly understood, and rehabilitation programs generally emphasize treatment rather than incarceration. *Id.* at 202.

Neither MCL 769.11b nor the state and federal prohibitions against double jeopardy require that a defendant be given sentence credit for time spent in a

committed.* On appeal, the Court recognized that although *People v Milbourn*, 435 Mich 630 (1990), did not directly address the issue of proportionality with regard to monetary penalties, *Milbourn's* rationale was appropriate in reviewing the proportionality of the fine in relation to the crime committed. *Antolovich*, *supra* at 719. Even though the fine imposed did not exceed the statutory limit, the *Antolovich* Court concluded that the defendant's fine was excessive where the “[d]efendant was fined the maximum amount allowed by the statute for delivering one of the least amounts necessary to violate the statute.” *Id.* at 719-720.

As a condition of probation. When a fine is imposed on a defendant sentenced to probation, payment of the fine may be made a condition of the defendant's probation. MCL 771.3(2)(b). A sentencing court may order the probationer to pay the fine immediately or the court may permit the probationer to make payment within the time period of his or her probation. *Id.*

The fines authorized by MCL 769.1k(1)(b)(i) also apply when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3). A defendant may be required to pay by wage assignment any fine imposed under MCL 769.1k, MCL 769.1k(4), and the court may provide that those fines be collected at any time, MCL 769.1k(5). Unless otherwise required by law, a court may apply any payments made in excess of the total amount imposed in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

8.34 Costs

A sentencing court may not order a defendant to pay costs unless those costs are expressly authorized by a penal or procedural statute. *People v Jones*, 182 Mich App 125, 126 (1990) (the penal statute under which the defendant was sentenced, MCL 333.7401(2)(c), provided for punishment by imprisonment or fine or both, but did not expressly authorize the imposition of costs).

MCL 769.1k* is a procedural statute that provides a court with general authority to impose “[a]ny cost in addition to the minimum state cost” when sentencing a defendant in certain circumstances. MCL 769.1k(1)(b)(ii). Moreover, a defendant may be ordered to pay any additional costs incurred to compel his or her appearance. MCL 769.1k(2). “The plain language of MCL 769.1k does not require the trial court to consider a defendant’s ability to pay before imposing discretionary costs and fees” *People v Wallace*, 284 Mich App 467, 470 (2009). In addition to the authority to impose costs, MCL 769.1k(4) authorizes a court to order that a defendant pay by wage assignment any of the costs authorized in MCL 769.1k(1) and (2). A court may provide for the collection of costs imposed under MCL 769.1k at any time. MCL 769.1k(5). Unless otherwise required by law, a court may apply any payments made in excess of the total amount imposed in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

*Effective
January 1,
2006. 2005 PA
316.

MCL 769.34(6) addresses the sentencing guidelines and the duties of the court when sentencing, and it authorizes the court to order court costs (“[a]s part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments”). *People v Lloyd*, Mich App (2009). Accordingly, the plain language of MCL 769.1k and MCL 769.34(6) “expressly grant[] the trial court authority, when sentencing, to order a defendant to pay court costs.” *Lloyd, supra* at . In *Lloyd, supra* at , the Court relied on MCL 769.1k and MCL 769.34(6) to refute the defendant’s argument that he could not be ordered to pay court costs because the statute governing the offense of which he was convicted, felony-firearm (MCL 750.227b), did not contain an express provision allowing costs.

MCL 769.3 and MCL 769.1f are procedural statutes in which court-ordered costs are expressly authorized. MCL 769.3(1) authorizes conditional sentencing where a court may order a defendant to pay the costs of prosecution in cases where the defendant was convicted of an offense punishable by a fine or imprisonment or both. MCL 769.1f authorizes a sentencing court to impose the costs of prosecution (among other monetary penalties) when a defendant is convicted of the offenses listed in the statute. The offenses for which costs are authorized under MCL 769.1f are discussed in subsection (B), below.

As a condition of probation. Costs as a condition of probation are authorized by MCL 771.3(2)(c).^{*} Any costs awarded under the statute must comply with the requirements of MCL 771.3(5):

“[T]he costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer.”

A trial court properly imposed costs under MCL 771.3(5) to reimburse the prosecution’s expense of an expert witness at trial, where the costs were “expenses specifically incurred in prosecuting the defendant.” *People v Brown*, 279 Mich App 116, 139 (2008).

Any costs imposed under MCL 771.3(5) “must bear a reasonable relationship to the expenses of prosecution.” *People v Blachura*, 81 Mich App 399, 403 (1978), citing *People v Teasdale*, 335 Mich 1, 5 (1952).

The costs authorized by MCL 769.1k(1)(b)(ii) and (2) also apply when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3). A defendant may be required to pay by wage assignment any cost imposed under MCL 769.1k, MCL 769.1k(4), and the court may provide that those costs be collected at any time, MCL 769.1k(5).

When determining the appropriate amount of costs to order and the method by which a probationer will make payment, a trial court is obligated to consider a probationer’s financial resources and the burden that costs will have on the

*See Section 8.40 for a comprehensive discussion of probation conditions.